

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

SAN DIEGO UNIFIED SCHOOL DISTRICT,)	
Employer)	
)	
and)	
)	Case No. LA-R-6
SERVICE EMPLOYEES INTERNATIONAL)	LA-R-167
UNION, LOCAL 102, AFL/CIO,)	LA-R-168
Employee Organization)	LA-R-169
)	LA-R-170
and)	LA-R-171
)	LA-R-172
CLASSIFIED EMPLOYEES ASSOCIATION)	
OF THE SAN DIEGO UNIFIED SCHOOL)	EERB Decision No. 8
DISTRICT AND THE SAN DIEGO)	
COMMUNITY COLLEGE DISTRICT,)	February 18, 1977
Employee Organization)	
)	
)	
)	

Appearances: Ralph D. Stern, Attorney, for San Diego Unified School District; William J. Bauer, Attorney, for Classified Employees Association; and Bob Anderson, for Service Employees International Union, Local 102, AFL/CIO.

Before Alleyne, Chairman; Cossack and Gonzales, Members.

OPINION

PROCEDURAL HISTORY

On April 1, 1976, Service Employees International Union, Local 102, AFL/CIO (Local 102) filed a request for recognition with the San Diego Unified School District for a custodial unit.¹

On the same day, the Classified Employees Association (CEA) filed requests for recognition for six separate units: educational office personnel²; professional and technical³;

¹ The request for recognition by Local 102 for the custodial unit included the following job classifications: building services supervisor IV, building services supervisor III, stadium attendant, building services supervisor II, senior custodian crew leader, building services supervisor I, custodian crew leader, locker room attendant, custodian, housekeeper, custodian helper, and classroom assistant.

² The request for recognition by CEA for the educational office personnel unit included the following job classification: mail clerk, account clerk IV, insurance clerk, rentals clerk,

maintenance, warehouse and transportation⁴; food services⁵;

school clerk III, head telephone operator, senior personnel clerk, intermediate clerk, account clerk (terminal), financial clerk III, financial clerk II, financial clerk I, senior accounting clerk, senior clerk, stock analysis clerk, account clerk III, accounting clerk, braille typist, information clerk, intermediate personnel clerk (terminal), material control clerk, school clerk II, account clerk II, clerk II, invoice clerk, translator typist, account clerk, I, clerk (terminal), clerk bookkeeper, data processing clerk II, telephone operator, junior personnel clerk (terminal), school clerk I, school library technician I, school library technician II, school clerical assistant, data processing clerk I, junior clerk, department aide, resource secretary, school secretary III, secretaray III, secretary (terminal), school secretary II, secretary II, school secretary I, secretary I, steno clerk, legislative secretary, school general secretary III, school general secretary II, and school general secretary I. At the hearing CEA amended its request by deleting from the unit the secretary II who works in the security office.

³ The request for recognition by CEA for the professional and technical employees unit included the following job classifications: budget analyst, personnel analyst III, assistant planning engineer, associate systems analyst/programmer, associate budget analyst, community activities coordinator, financial analyst I, civil engineering draftsman II, architectural draftsman III, dietician I, landscape draftsman, senior buyer, accountant, administrative assistant I, assistant budget analyst, personnel analyst II, assistant property agent, architectural draftsman II, buyer, EDP programmer, occupational therapist, systems analyst/programmer, community services specialist I, transportation specialist, dietetic assistant, editorial assistant, personnel analyst I, administrative aide, human relations assistant, editorial aide, junior accountant, budget technician, architectural draftsman I, assistant systems analyst/programmer, civil engineering draftsman I, elementary school assistant, publications assistant, jprincipal duplicating equipment operator, senior computer operator, computer operator, supervising data entry operator, duplicating equipment operator, junior computer operator, data entry operator, junior duplicating equipment operator, data processing aide, duplicating aide, media systems specialist, artist illustrator II, photographer, instructional media cataloger, television specialist, artist illustrator I, media technician, film service technician, library clerk, assistant photographer, television equipment operator, elementary library technician, graphics aide, television production aide, booking clerk, circulation clerk, art assistant, and film inspector.

⁴ The request for recognition by CEA for the maintenance, warehousing and transportation employees unit including the following job classifications: bus and mail driver, cafeteria

building services;⁶ on classified supervisor⁷.

van driver, truck driver, senior stock clerk, stock clerk, truck driver helper, assistant stock clerk, building inspector leadman, building inspector II, building inspector I, electrician leadman, electronic equipment leadman, equipment repair foreman, maintenance aide, plumber leadman, steamfitter leadman, electrician, electronic equipment technician, office equipment repair foreman, plasterer, plumber, refrigeration mechanic, sheetmetal worker, steamfitter, military property custodian, carpenter leadman, equipment repairman leadman, gs repairman leadman, glazier leadman, locksmith leadman, painter leadman, utility foreman, inventory clerk, carpenter, cement mason, equipment repairman, gas repairman, glaizer, heavy equipment operator, iron worker, locksmith, painter, piano technician, roofer, spray painter, utility leadman II(terminal), automotive mechanic helper, office equipment repairman, skilled trades helper, typewriter and equipment repairman, fire equipment serviceman, ROTC assistant, utility leadman I, utility man II (terminal), shop assistant, utility man I, classroom equipment repairman, automotive serviceman, laborer, automotive mechanic leadman, ironworker leadman, asphalt machine operator, equipment repair assistant, and automotive mechanic.

⁵ The request for recognition by CEA for the food services association unit included the following job classifications: area cafeteria manager, cafeteria manager I, senior cook, cook, pastry cook, snack bar attendant, food service worker II, and food service worker I.

⁶ The request for recognition by CEA for the building services unit included the following job classifications: stadium attendant, senior custodian crew leader, custodian crew leader, classroom assistant, locker room attendant, custodian, housekeeper, custodian helper, gardener, assistant gardener, building services supervisor I, building services supervisor II, building services supervisor III, and building services supervisor IV.

⁷ The request for recognition by CEA for the classified supervisory employees unit included the following job classifications: supervising personnel clerk, testing clerk, supervising library clerk, maintenance clerk, bus operations supervisor, planning engineering, assistant architect, administrative services supervisor, computer software specialist, EDP operations supervisor, equipment and systems supervisor, personnel operations supervisor II, senior budget analyst, senior systems analyst, senior systems analyst/programmer, personnel analyst IV, food service finance supervisor, financial analyst II, public information specialist, bus operations inspector, senior accountant, supervising buyer, architectural draftsman IV, personnel operations supervisor I, internal controlssupervisor,

On April 19, 1976, Local 102 filed an intervention for a maintenance unit which, as amended, includes all the job classifications in the maintenance, warehousing and transportation unit requested by CEA and all "gardener" classifications in the building services unit requested by CEA. On May 4, 1976, Local 102, filed an intervention in the same food services unit requested by CEA.

A hearing was conducted on September 15-17, 1976, by a hearing officer of the Educational Employment Relations Board.

ISSUES

There are three issues in this case:

1) What unit or units are appropriate for classified employees in the San Diego Unified School District?

2) Are the following job classification "supervisory":

Area cafeteria manager,
Cafeteria manager I,
Building services supervisor III,
Building services supervisor IV,
Head gardener?

3) Should the CEA petition for a supervisory unit be dismissed as violative of Government Code section 3545(b) (2) which prohibits the same employee organization from representing both supervisory and rank-and-file employees of the same employer?

purhcasing operations supervisor, administrative assistant I (M. Hubbard only), landscapt architect, supervising library catagloger, supervising accountant, community services specialist II, audiovisual materials distribution supervisor, data processing control coordinator, transportation supervisor, bus dispatcher-scheduler, stores supervisor, supervising cafeteria van driver, inventory supervisor, food services operations supervisor, head stock clerk, duplicating supervisor, supervising computer operator, mechanical engineer, assistant construction supervisor, carpentry supervisor, eletrical supervisor, garage supervisor, grounds maintenance supervisor, heating and plumbing supervisor, painting supervisor, supervising building inspecor, assistant carpentry supervisor, assistant electrical supervisor, assistant grounds maintenance supervisor, assistant heating and plumbing supervisor, assistant painting supervisor, supervising maintenance aide, administrative assistant II (J. Pyle and W. Woehler only), field supervising gardener, head gardener, cafeteria field supervisor, dietician II, cafeteria manager II, patrol supervisor, patrol officer leadman, and landscape engineer.

DISCUSSION

In 1975-76, the San Diego Unified School District had an average daily attendance of approximately 125,815 students with 88,476 in elementary school and 37,339 in high school. There are 164 school sites. The District employs approximately 4200 classified employees and 5,800 certificated employees.⁸

Appropriate Units

At the hearing, the district and CEA proposed a unit of all regular classified employees other than security employees, paraprofessional employees, management, supervisory and confidential employees. Although CEA originally petitioned for five separate units of non-supervisory employees, it modified its position at the hearing to favor consolidation of the five non-supervisory units for which it originally petitioned. CEA maintained as a secondary position, however, that if the Board finds that the board consolidated unit is not an appropriate unit, then the five separate units are appropriate.

At the hearing, Local 102 continued to propose the custodial unit, maintenance unit and food services unit previously described. Local 102 does not seek to represent the educational office personnel or professional and technical employees for which CEA petitioned.

Government Code section 3545(a) provides:

In each case where the appropriateness of the unit is in an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent of which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

Apply the statutory unit determination criteria to the facts of this case, we find, as we did in Sweetwater Union High School District⁹ and Fremont Unified School District,¹⁰ that the following units are appropriate:

- (1) An "office technical and business services" unit,

⁸ We take official notice of the Annual Apportionments Report, California State Department of Education (July 1976).

⁹ EERB Decision No. 4, November 23, 1976.

¹⁰ EERB Decision No. 6, December 16, 1976.

consisting and the job classifications in the educational office personnel and professional and technical units proposed by CEA, and,

(2) An "operations-support services" unit, consisting of the job classification in building services (except classroom assistants); maintenance, warehousing and transportation; and food services units proposed by CEA, which are identical to the classification in the custodial, maintenance and food services units proposed by Local 102.

The petitions of CEA for a unit of educational office personnel and a unit of professional and technical employees include a combined total of approximately 1200 employees. These clerical, secretarial, professional and technical employees constitute a separate appropriate unit based upon a separate and distinct community of interest. The clerical, secretarial, professional, and technical employees in the San Diego Unified School District, like the "office-technical and business services" employees in the Sweetwater and Fremont district, have functions, skills, and training which are distinct from the other classified employees in the district.

While evidence was offered concerning the question of whether gardeners should be placed in a unit of custodial or maintenance personnel, little evidence was offered concerning the separate community of interest of the other non-supervisory units proposed by CEA or Local 102. In the absence of a showing of a separate and distinct community of interest which would distinguish food service, maintenance, or custodial employees from other classified employees, we find that these other proposed units are not separate appropriate units. We find in this case, as in Sweetwater and Fremont, that because none of the other proposed units are separately appropriate these approximately 1700 employees are properly grouped in a single negotiating unit which we shall refer to as an "operations-support services" unit.

CEA has requested that one classification of paraprofessional employees, classroom assistants, be included in its building services unit. However, neither employee organization has petitioned for any of the other ten job classification listed under the heading of "paraprofessional" employees on the district's classified salary schedule.

Classroom assistants are distinguishable from the other classified employees CEA and Local 102 seek to represent since they work under the supervision of a classroom teacher and their primary functions involve dealing directly with students at the instructional level. We conclude, as we did in Pittsburg Unified School District,¹¹ that it is not appropriate to include paraprofessionals in a unit of other classified employees.

¹¹ EERB Decision No. 3, October 14, 1976.

The district's Employee Relations Manager testified concerning the criterion of "efficiency of operations". He stated that, in his opinion, a number of small units would make it more difficult for school principals to administer the educational program, increase the costs of multiple fringe benefit programs, increase the costs of administering negotiations, cause administrative inefficiency, create jurisdictional disputes between various bargaining units, promote instability in employee-employer relations, and inhibit employee job mobility and job security. This list of the possible adverse effects of excessive fragmentation reflects the legitimate concerns of the employer. We believe that our determination of two negotiating units is responsive to these concerns and strikes the proper balance between excessive fragmentation units and the employees' right to effective representation in appropriate units.

Evidence was offered showing that in past years both CEA and SEIU submitted "meet and confer proposals" on behalf of all classified employees. As in Sweetwater, supra, no evidence was offered to indicate how the group of all classified employees was selected by the employer and employee organizations as the "unit" to be represented. Absent such evidence, the Board is unable to conclude that a board unit is in fact established by past practice as an appropriate unit for successful future negotiating. Therefore, in the instant case, we give little weight to the evidence of established practices offered by the parties in determining appropriate negotiating units.

Supervisory Issues

Government Code section 3540.1(m) defines a supervisory employee as follows:

Supervisory employee means any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing functions, the exercisen of such authority is not of a merely routine of clerical nature, but requires the use of independent judgement.

This section is written in the disjunctive; therefore, an employee need not possess all of the enumerated functions or duties to be a supervisor. The possession of any one of the enumerated duties or the effective power to recommend such action through the use of independent judgement is sufficient to make one a supervisor within the meaning of the Act.¹²

¹² Ohio Power Co. v. NLRB, 176 F. wd 385, 23 LRRM 1242 (C.A. 6, 1949), cert. denied, 388 U.S. 899.

Area Cafeteria Manager

The employer and CEA, unlike Local 102, contend that the area cafeteria managers are supervisors within the meaning of the Act. We agree.

There are 20 area cafeteria manager. Each organizes and manages a district area cluster feeding program, including the operation of a cluster food preparation kitchen and six to eight satellite serving kitchens. There are between 14 to 20 employees at each cluster kitchen and each satellite serving facility. Area cafeteria managers directly supervise those employed at the satellite facilities; those employed at the cluster kitchens are first supervised by cafeteria manager I's who in turn report to an area cafeteria manager.

Area cafeteria managers have the authority to assign and direct the work of the employees at the satellite sites and to assign and direct, directly or through the cafeteria manager I's, the employees to correct problems. Area cafeteria managers act on their own authority to assign overtime. They personally evaluate the work performance of all employees at the satellite sites and review the evaluations prepared by the cafeteria manager I's at the cluster kitchens. They resolve grievances and complaints of employees in the cluster feeding programs. In at least one instance an area cafeteria manager recommended the transfer of an employee because of a personality conflict and the recommendation was followed by the Food Service Director.

In view of the foregoing, we conclude that area cafeteria managers are supervisors within the meaning of Section 3540.1(m) of the Act.

Cafeteria Manager I

The employer and CEA, unlike Local 102, contend that the cafeteria manager I's are supervisors within the meaning of the Act. We agree.

There are 31 cafeteria manager I's; 20 serve in a cluster food preparation kitchen under the supervision of an area cafeteria manager and oversee the work of 14 of 20 employees; five serve under the direct supervision of one of two cafeteria field supervision in an independent elementary school kitchen staffed by four to seven employees; five serve under the direct supervision of one of the two cafeteria field supervisors in an independent high school kitchen staffed by 16 to 26 employees; and one is in charge of a coffee shop.

The cafeteria manager I's assign and direct to work of employees reporting to them. They prepare work schedules, independently authorize overtime and coordinate vacation schedules. They have the authority to recommend disciplinary

action; one cafeteria manager I testified that she recommended disciplinary action to a cafeteria field supervisor and a probationary employee was subsequently discharged in accordance with her recommendation. Another testified that she had recommended the transfer of an employee and the recommendation was followed. Cafeteria manager I's have the first-line authority to adjust employee grievances. Two cafeteria manager I's testified that they had resolved employee complaints and grievances, most frequently by revising work schedules.

Cafeteria manager I's recommend persons for promotion through the preparation of employee work performance evaluations. Those who work in the cluster kitchens prepare and submit the work performance evaluations to the area cafeteria manager who may make small changes. These recommendations are generally followed. Those who work in the elementary and high school kitchens sign and submit the evaluations directly to the cafeteria field supervisor.

Since cafeteria manager I's possess several of the indicia of supervisory status enumerated in Section 3540.1(m), we find them to be supervisors within the meaning of the Act.

Building Services Supervisor III and IV

The employer, unlike CEA and Local 102, contends that building services supervisors are supervisors within the meaning of the Act. We conclude, as we did in Sweetwater, supra, that they are supervisors.

Building services supervisor III and IV have nearly identical duties. The building services supervisor III is assigned a custodial crew of five to nine employees. The building services supervisor IV is assigned 10 to 15 employees and oversees the cleaning and maintenance of a larger plant than is overseen by the building services supervisor III. Building services supervisors work an 8 1/2 hour day from 6:00 or 7:00 a.m. to 2:30 or 3:30 p.m.. Usually one custodian works the day shift, concurrent with the building services supervisor, while the remainder of the custodial crew works the evening shift under the immediate direction of a crew leader who reports to the building services supervisor. The evening shift is from 1:30 or 2:00 p.m. to 10:00 or 10:30 p.m..

CEA argues that a building services supervisor may be classified as a supervisor only if he is physically present to observe the work as it is performed. We do not view physical presence during the entire work shift as a condition precedent to finding of supervisory status. One building services supervisor testified that he spends five or six hours a day inspecting work done by the custodians and preparing instructions for the crew leader and custodians. The record discloses that building services supervisors use various methods to communicate instructions to the evening custodial crews. One building

service supervisor meets regularly with his crew leader each day and relies on the crew leader to relay his instructions to the remaining crew members; another meets daily with the crew leader and the entire evening custodial staff. One building service supervisor testified that he leaves specific written instructions to individual crew members on hooks bearing each crew member's name. We conclude that each of these methods of communicating instructions is sufficient to constitute responsible and effective direction of the custodial crew.

Building services supervisors prepare work schedules for crew leaders and custodians. They prepare and approve overtime schedules, approve time sheets, and prepare and sign formal work performance evaluations of custodians and crew leaders report to them. They have the authority to recommend the transfer of an employee; two building services supervisors testified that they have recommended to the Principal that an employee be transferred and their recommendations were followed. They also have the authority to effectively recommend that employees be dismissed. One building services supervisor on two occasions recommended that an employee be dismissed; his recommendations were followed in both instances. On two occasions the same building services supervisor recommended that an employee be suspended and his recommendations were followed.

In our view, the judgement required of building services supervisors in planning, scheduling, assigning, and directing the work to be performed by custodians and crew leaders reporting to them is not rendered routine merely because much of the work performed by these subordinate employees is manual labor. The evidence establishes that building services supervisors must exercise independent judgement in the performance of their duties.

We conclude that since building service supervisors possess several of the indicia of supervisory status enumerated in Section 3543.1(m), they are supervisors within the meaning of the Act.

Head Gardener

CEA takes no position on this issue. The employer, contrary to Local 102, contends that head gardeners are supervisors within the meaning of the Act. We agree.

There are 15 head gardeners in the district, each of whom is assigned a gardening crew of five to nine employees. Each crew is responsible for eight to ten school sites.

The head gardeners independently develop work schedules for their crews and on an ongoing basis assign crew members to perform necessary work.

They supervise on-the-job training of crew members and direct

crew members in their performance of specific tasks. They expect their instructions to be followed. They spend approximately two-thirds of their time in the performance of supervisory functions and the remaining one-third in the performance of gardening work. They prepare and sign annual and probationary work performance evaluations. One head gardener testified, when asked to describe his duties, as follows: "Direct, train, evaluate, and everything connected with it, I guess."

Head gardeners are the persons charged in the first instance with adjusting grievances and complaints of crew members. They are also the individuals to whom administrators and teachers first address complaints regarding the performance of gardening tasks.

The evidence establishes that head gardeners must exercise independent judgement in the exercise of their duties. Accordingly, since head gardeners possess several of the indicia of supervisory status enumerated in Section 3540.1(m), we find that they are supervisors within the meaning of the Act.

The Supervisory Unit

CEA petitions for a unit of approximately 175 supervisory employees as well as for five units of non-supervisory employees. The district takes the position that Government Code Section 3545(b)(2) does not permit an employee organization to simultaneously file petitions on behalf of both supervisory and non-supervisory employees and then subsequently elect which group to represent. The district argues that the employee organization must decide whether to seek to represent supervisory or non-supervisory employees at the time it files any request for recognition.

Section 3545(b)(2) states:

(b) In all cases:

(2) A negotiating unit of supervisory employees shall not be appropriate unless it includes all supervisory employees employed by the district and shall not be represented by the same employee organization as employees whom the supervisory employees supervise

This section does not specifically mention or refer to simultaneously filed petitions. However, it is clear that if CEA becomes the exclusive representative of any of the units we find to be appropriate, it could not become the exclusive representative of the district's classified supervisory employees. On the other hand, if CEA does not become the exclusive representative of any of the non-supervisory employees it would be entitled to represent supervisors.

In this case, after the resolution of the supervisory status of several classifications of employees, no issues remain

regarding the supervisory unit. No purpose would be served by a finding that the supervisory petition should be dismissed at this time. Further, it would cause considerable delay and inconvenience if CEA were required to initiate a new petition for a supervisory unit should it fail to win any of the non-supervisory elections.

Accordingly, we conclude the CEA's simultaneously filed petition does not contravene any section of the Act, particularly Section 3545(b)(2), which nowhere mentions simultaneous petitions. However, no election shall be conducted in the classified supervisory unit until the results of the non-supervisory elections are final and certification has issued. If CEA is selected as the exclusive representative of any non-supervisory classified unit, its petition for a supervisory unit shall be dismissed. If CEA is not selected as the exclusive representative of any non-supervisory classified unit, the Regional Director shall conduct an election in the supervisory unit in accordance with the rules and regulations of the Board.

ORDER

The Educational Employment Relations Board directs that:

1. The following units are appropriate for the purpose of meeting and negotiating, providing an employee organization becomes the exclusive representative:

Office-technical and business services unit

Included: educational office personnel; professional and technical employees.

Excluded: all other employees, including managerial, supervisory, and confidential employees.

Operations-support unit

Included: maintenance, warehousing and transportation employees; food services employees; building services employees.

Excluded: classroom assistants and all other employees, including managerial, supervisory, and confidential employees.

2. The employee organizations have the ten workday posting period of the Notice of Decision in which to demonstrate to the Regional Director at least 30 percent support in the non-supervisory units. The Regional Director shall conduct an election in the non-supervisory units at the end of the posting period if (1) more than one employee organization qualifies for the ballot, or (2) if only one employee organization qualified for the ballot and the employer does

not grant voluntary recognition.

3. The following unit is appropriate for the purpose of the meeting and negotiating, providing an employee organization becomes the exclusive representative:

Supervisory unit

Included: all classified supervisory employees, including head gardeners, cafeteria managers I, area cafeteria managers, building services supervisors III, and building services supervisors IV.

Excluded: all other employees, including managerial and confidential employees.

4. After the question of representation for all non-supervisory units has been finally resolved, and if CEA is not selected as the exclusive representative of any of the non-supervisory units, the Regional Director shall direct an election in the classified supervisory unit if (1) more than one employee organization qualifies for the ballot, or (2) if only one employee organization qualifies for the ballot and the employer does not grant voluntary recognition.

5. The following employees are "supervisors" within the meaning of Section 3540.1(m) of the Act.

Area cafeteria manager
Cafeteria manager I
Building services supervisor III
Building services supervisor IV
Head gardener

By Jerilou H. Cossack, Member

Raymond J. Gonzales, Member

Dated: February 18, 1977

Reginald Alleyne, Chairman, concurring in part, dissenting in part:

I agree that the disputed negotiating units described in the Board's order are appropriate, that the petition for the supervisory unit should not be dismissed, and that the area cafeteria manager and the cafeteria manager I are supervisors within the meaning of the act. I dissent from the conclusion that the building services supervisors and the head gardeners are supervisors within the meaning of the Act and therefore

ineligible for inclusion in the unit of nonsupervisory employees.

In this case, as in Sweetwater Unified School District,¹³ the majority opinion ignores the statutory mandate that routine leadership duties not requiring the exercise of independent judgment are not supervisory duties within the meaning of the Act; it relies on isolated instances of purported supervisory duties, describes them in conclusory rather than factual terms, and thus makes the isolated instance appear to be the common practice; it entirely ignores a compelling fact militating against a supervisory status; the indisputably nonsupervisory maintenance, gardening and custodial work the head gardeners and the building services supervisors perform.

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Building Services Supervisors

Building services supervisors generally work from 6:30 a.m. to 3:00 p.m. Custodians work from 2:00 p.m. to 10:00 p.m. The two shifts actually overlap for only 30 minutes. A single custodian known as a "day man" works the same shift as the building services supervisor. A "few" building services supervisors III work without another custodian on duty. The record reflects that the relationship between the building services supervisor and the day man is not that of supervisor-subordinate so much as it is one of co-workers.

Building services supervisors report to a field supervisor, who in turn is supervised by the Director of the Custodial and Gardening Department. At the hearing, this is how the Custodial and Gardening Director described the daily work of the building services supervisors:

Q: Do the Building Services Supervisor IV do any custodial work themselves during the day?

A: They do quite a lot of work. It is not scheduled in work. They usually have some duties that they take on themselves on a fairly regular basis, but, if it came to readjusting a room, moving furniture, moving audio-visual materials, putting up supply orders, taking supplies to the room, setting up the cafeterias, they do these things.

Q: You mentioned there is what? One Custodian, generally at one of these sites.

A: For the most part, they have, at varying hours, a day

¹³ EERB decision No. 4, November 23, 1976.

man.

Q: So, between the Building Services Supervisor IV or III and one Custodian, any work that needs to be done is shared between those two.

A: That is right.

Q: What about during the vacation times? Does the Building Services Supervisor IV or III do any custodial work?

A: They do quite a bit in the summer cleaning portion. The first half of most summers is summer school, and then they have a real major cleaning job. While they have some work to do, they feel that it helps them, in getting their work done and in working with their crew, and they, quite frequently will work along with one of the crews.

Q: This would explain Exhibits 2 and 3, where for both both III and the IV, the primary sentence opens with, "Act as working supervisor?"

A: Yes, they are available during the day: they and that day man. If there is work to be done, they do it.

The Custodial and Gardening Director who thus described the duties of a building services supervisor, described his own duties as follows:

To provide direct supervision for a staff of gardeners who do the maintenance gardening for the District, and to provide technical supervision, budget control and management for the custodial forces of the District.

No other witness at the hearing was in a better position to describe the general duties of building services supervisors throughout the district.

The Custodial and Gardening Director described the approximately one-half hour overlap of the building services supervisors' and custodians' shifts. His testimony shows how routine the building services supervisors' scheduling of custodial work is.

Q: Of that half-hour, where the workers overlap, what percentage of that half-hour is spent in supervising the other workers?

A: The general practice is that they have a place where they assemble, and that would be the time when they would come in, hopefully a few minutes ahead of the time that they actually have to start in their route, and they would sit down and have a cup a coffee. That would be

the time before they actually hit their route that they would talk over any problems.

Q: Other than talking, what else would they be doing at that time, than haing a cup of coffee?

A: Before they went on their route?

Q: Right.

A: There wouldn't be anything else happening. The men have a schedule that has been prepared that they have been doing each day, and at the appropriate time, why, they would start out their schedule.

Q: So basically, they work against the schedule. Is that correct?

A: Certainly.

Q: That schedule is basically a routine thing. Is that correct?

A: It is routine insofar as that man is there, and there are no problems or changes at the site.

Q: But, as you indicate, there is a schedule, and it is routine work that has to be done every day. Thet basically go ahead and just do that, correct, without somebody telling them some specific thing?

A: That is correct.

Q: I was asking about the routine work that they had to do, and, you can tell me: Is it not a fact that they do not have to exercise independent judgement on that particular day to assign work to be done?

A: For most days, the schedule is followed. The men come in and they pick up their tools and do their schedule.

Q: You could answer that question, "Yes", then--

A: Yes

Q: --that they do not have to use independent judgement.

A: The men do not.

Q: As to the actions necessary by the III or the IV, does he have to exercise some completely independent judgement to tell the worker what to do that day, or is he going to follow a routine?

A: He is going to follow a routine.

The majority opinion does not comment on this evidence; instead, it refutes an argument made by no one. The majority opinion states:

...the work to be performed by custodians and crew leaders reporting to them is not rendered routine merely because much of the work performed by these subordinate employees is manual labor.

Actually, no one has argued that manual labor is routine. Plumbing is manual labor, but it is not routine work. The work of the custodians and the limited direction they are given was argued to be routine and is routine because the record contains uncontradicted evidence by a district official, and by others, that the direction and scheduling of that work, to the limited extent that it requires scheduling and direction, is routine.

In addition to the testimony, the building services supervisor at La Jolla High School gave testimony on the routine nature of scheduling custodial work:

Q: Is the work that is done by the crew that comes in the afternoon of a routine nature?

A: Generally it is a routine nature, depending on the time of the year. Like at this time of the year there are a lot of changes to be done. They have to work into their schedules shifting furniture and the last part of the year it is fairly routine.

Q: And the routine consists of sweeping so many classrooms and dusting so many classrooms and this kind of thing?

A: That is correct.

Q: Who makes up the schedule?

A: I do.

Q: And after it is made up does it generally stay or it is changed?

A: For several years it has stayed static. There was no need of changes, but then we got cutbacks and because of

budget reductions the cutback--first I think seven percent and then another five percent in your custodial time was allowed. And then we proceeded to have to change schedules. Right now since we are in the building program getting new buildings we are having to make up new schedules. If you have an established plan with no changes, schedules can pretty well remain static for several years.

Q: Year after year?

A: Yes.

The majority opinion takes out of context the testimony of one building services supervisor, by stating:

One building services supervisor testified that he spends five or six hours a day inspecting work done by the custodians and preparing instructions to the evening custodial crews.

The majority opinion then describes how building services supervisors relay instructions in writing to their crews.

First, it makes little difference how often building services supervisors relay instructions, if the instructions are routinely given for routine work, if the building services supervisors have no effective power to discipline employees who fail to perform satisfactorily, and if the building services supervisors' powers in that respect amount to nothing more than relaying to higher authority a report on what problems exist. Second, the "five or six hours a day inspecting work," as mentioned in the majority opinion, is not five or six hours of inspection of the work performed by custodians. Read as a whole, the witness' testimony reveals that what he regards as inspection is not only the routine work of custodians but his own individual maintenance work as well. He described his duties as follows:

Q: When you get school ready, besides opening the doors, what else would you be doing?

A: Well, in the cool times I have to check the boilers to make sure that they are all operating. They are supposed to be automatic, but they are not necessarily automatic. Sometimes they do malfunction. Turn off the alarm system. Turn off the light system. Open the windows in the office in the warm weather and things of that sort.

The witness subsequently testified that he spends five or six hours a day inspecting and talking to the crew leaders. But still later, he testified:

Q: In some of your early morning inspection done to check the school to see if it is secure, to see if any vandalism has occurred or if there have been any break-ins or anything of that nature?

A: That is part of it. I would probably find it at that time if it has occurred, yes.

Q: Are you looking for that?

A: Yes.

If this witness had the power to do something effective about a custodian's unsatisfactory performance, the case for his supervisory status would be enhanced. But he testified to the contrary, as follows:

Q: You have never recommended anybody be suspended or laid off or terminated on your crew, or have you? Let me put it that way. Have you ever recommended that any member of your crew when you were a III be suspended, laid off or discharged?

A: Not as a Head III.

Q: Have you ever given a man a less than satisfactory evaluation?

A: Not as Head III.

The majority opinion says that "two building services supervisors testified that they have recommended to the Principal that an employee be transferred and their recommendations were followed." The majority opinion does not state, but the record does demonstrate, that once in 5 years one building services supervisor recommended one transfer to another school and that the recommendation was followed. The record does not show whether this was a disciplinary transfer or whether the employee involved in the transfer had simply requested a transfer. In the second instance, one transfer recommendation was made by one building services supervisor, but only after building services supervisor "talked it over with the Principal" was the matter discussed with the Custodial and Gardening Director. The record does not indicate what kind of transfer was involved.

I think that these two isolated and vague references to transfers and the intervention of the Principal in one before it was discussed with the Custodial and Gardening Director, hardly demonstrate an effective power to use independent judgement in respect to the transfer of employees.

On suspensions and dismissals, the majority opinion cites one building services supervisor as having effectively recommended

the suspension of two employees on two occasions and the dismissal of employees on two occasions. In fact, the record contains no evidence that any building services supervisor recommended the suspension of any employees;¹⁴ the record does reveal that on two occasions, one building services supervisor played a limited role in the dismissal of an employee. In one instance, a teacher complained about the dismissed employee's work, but not to the building services supervisor; the complaint was made to an administrative assistant, who discussed the matter with the building services supervisor; then the building services supervisor, and the administrative assistant and the crew leader discussed the matter with the principal. The building services supervisor made out the recommendation, the principal signed it and the employee was eventually dismissed. In the second dismissal recommendation, the administrative assistant discussed the employee's shortcomings with the building services supervisor; the administrative assistant discussed the case with the principal. The building services supervisor did not discuss the case with the principal. Both the building services supervisor and the administrative assistant signed the "discharge statement".

I believe that in these two isolated instances, the evidence demonstrates that the building services supervisor was little more than one of several people looking into a charge of unsatisfactory work and reporting it to the principal; that the building services supervisor in neither case independently made a recommendation for dismissal, but had to rely on the recommendation of the administrative assistant to make an effective recommendation to the principal, who in turn made a recommendation to the district. To hold that this is evidence of a supervisory status runs contrary to the words "independent judgement" as used in the Act's definition of supervisor. Further, these two isolated instances of dismissals not involving the use of independent judgment on the part of the building services supervisor, should be considered with the testimony of another building services supervisor at La Jolla High School, as follows:

Q: Would you agree with the prior testimony that generally you do not have authority to hire, transfer, suspend or lay off or promote or discharge?

A: I have no authority to hire or fire, discipline or what have you.

Q: Any of those things? You have no authority to do any

¹⁴ A building services supervisor first testified that he recommended the suspension of employees on two occasions; then he changed his testimony and said that he confused suspensions and dismissals and had recommended dismissals on two occasions but not suspensions.

of those items I mentioned?

A: That is right.

What really concludes the case against effective dismissal or other disciplinary powers by the building services supervisors is the testimony of the Wage and Salary Administrator got the district. He testified that the Custodial and Gardening Director would generally make "any recommendation as to any substantial disciplinary action involving any custodian." He also testified that the Custodial and Gardening Director's recommendation would be based on the recommendation of the principal. When asked whether the principal's recommendation was always followed by the superintendent's office, he answered, "No". When asked whether at the district level the Custodial and Gardening Director's recommendation was always followed, he answered, "I would say a higher percentage of time, but maybe not always then, either."

With one sweeping conclusory sentence, the majority opinion states that the building services supervisors "prepare and approve overtime schedules, approve time sheets and prepare and sign formal work performance evaluations of custodians and crew leaders reporting to them." The opinion does not elaborate. But the record demonstrates that these duties are not performed in a manner suggesting a supervisory status as defined in the Act.

One building services supervisor said he only evaluated 3 out of 10 custodians. At that, the evaluation of employees is not, alone, indicative of a supervisory status. In some cases it might suggest the power to discipline employees. But not in this case. Here, the Custodial and Gardening Director testified that the performance evaluation is not a disciplinary device but a counseling device. Further, the evaluation is signed not only by the building services supervisor, but also by the principal before it is forwarded to the Custodial and Gardening Director.

Evidence of authority to authorize overtime is not only lacking, it is plainly contradicted by the record, which reveals that overtime is authorized by the principal or by the Custodial and Gardening Director in the district office. One building services supervisor testified that he could only authorize overtime in an emergency situation arising at night. But then he testified that he never worked at night. The assignment of authorized overtime is so routine that the custodians "sork tht out themselves" with a rotation system.

Head Gardener

It is unnecessary to describe in detail all aspects of the record which shows that the district did not prove the supervisory status of head gardeners. A few highlights will suffice.

First, the work of the assistant gardener, who works under

the head gardener, and the work of custodians, are transferrable, as the following testimony by a head gardener reveals:

Q: You heard the custodial and gardening director's testimony that the Assistant Gardener and the Custodian are considered transferrable skills between those two classes. Do you agree with his testimony?

A: I would have to say that the Assistant Gardener and the Custodian are transferrable. Yes.

Q: And you indicated that, unfortunately, a portion of your work does have to do with picking papers and stuff before you can mow the lawns.

A: Unfortunately.

Second, it is the head gardener's field supervisor, and not the head gardener, who effectively recommends transfers, suspensions and disciplinary action. The following testimony by a head gardener is illustrative:

Q: You mentioned that you recommend transfers--or, the question was asked, and I don't know if you answered it or not, whether or not you recommend transfer, suspensions or disciplinary action.

A: No. In the past, I have brought up with my Field Supervisor a point of dissatisfaction with a particular employee, and it eventually has resulted in his being transferred to another crew for further evaluation from a different Head Gardener.

Q: Who made the decision to transfer him to another crew?

A: My Field Supervisor.

Q: This is one of the two Field Supervisors in the District?

A: Yes.

Q: You have never made another recommendation then, for any member of your crew to be suspended or disciplined in any other fashion?

A: No.

Third, the head gardener is required to do so much physical work that the district's job description requires a qualification for the head gardener position: "stamina and strength sufficient to maintain a rigorous work schedule requiring continuous and heavy physical exertion."

In all other respects, the head gardeners' direction and assignment of work and their evaluation of employees, is slightly less routine, and requires virtually no more independent judgement than that required of building services supervisors.

II

In concluding, as does the majority opinion, that building services supervisors and head gardeners are supervisors within the meaning of the Act, I think that the governing case law has been improperly ignored. The combination of two California Supreme Court decisions requires that we follow federal precedents in determining how to resolve a disputed supervisory issue.¹⁵

When the definition of supervisor was included in the NLRA by amendment, the sponsor of the amendment stated:

Such [supervisor] are above the grade of straw bosses, lead men, set-up men, and other minor supervisory employees...Their essential managerial duties are best defined by the words 'direct responsibly', which I am suggesting.¹⁶

This interpretation of the NLRA definition was recently cited with approval by the United States Supreme Court.¹⁷ It has been followed by National Labor Relations Board decisions holding that the performance of rank and file work is a leading indicator of a nonsupervisory status,¹⁸ and by NLRB decisions holding that

¹⁵ See *Fire Fighters Union v. City of Vallejo*, 12 Cal. 3d 608, 617, 87 LRRM 2453 (1974) and *Los Angeles Metropolitan Transit Authority v. Brotherhood of R.R. Trainmen*, 54 Cal. 2d 684, 46 LRRM 3065, 3066 (1960). The latter case states: "When legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation. This rule is applicable to state statutes which are patterned after federal statutes..."

¹⁶ 93 Daily Congressional Record 4804 (May 7, 1947).

¹⁷ *NLRB v. Textron, Inc.*, 416 U.S. 267, 85 LRRM 2945 (1974).

¹⁸ *NLRB v. Swift and Company*, 240 F. 2d 65, 39 LRRM 2278 (C.A. 9, 1957); *Teamsters Local 626 (Quality Meat Packing Company)*, 224 NLRB No. 40, 92 LRRM 1295 (1976) (directions involved no more than "a more experienced employee overseeing and

supervisory duties less routine than those involved in this dispute are not supervisory duties within the meaning of the Act.¹⁹ In rare cases, when the NLRB fails to apply its independent judgment aspect of the definition, the federal courts have reversed the NLRB.²⁰

III

As in Sweetwater, where I dissented on a similar issue, there is a policy reason why the building services supervisors and the head gardeners should not be deemed supervisors on this record. The majority opinion may effectively deny the building services supervisors and the head gardeners bargaining rights under the Act. Here all parties agreed upon a unit of all supervisors in the district. The head gardener and the building services supervisors might be represented in the unit. If, however, any of the employees in the nonsupervisory unit are supervised by anyone in the supervisory unit, the employee organization that represents the nonsupervisory employees may not represent the supervisory employees. Thus, depending upon the results of the election and the options exercised by the employee organizations, the head gardeners and the building services supervisors may not be represented by anyone. I think there is a presumption against this and that the employer should carry the burden of proving a supervisory status. I think that burden was not met.

facilitating the work of less experienced employees"); Laborers and Hod Carriers Local No. 341, 223 NLRB No. 143, 92 LRRM 1112 (1976).

¹⁹ Ibid.

²⁰ NLRB v. Dunkirk Motor Inn, 524 F. 2d 663, 90 LRRM 2961 (C.A. 2, 1975), stating in part: "And while [the Assistant Housekeeper] possessed the 'authority to order maids to take corrective action,' that authority was sparingly exercised. More frequently, Hancock would herself remedy any deficiencies which she found... Furthermore, Hancock lacked the power to discipline an individual maid whose performance was unsatisfactory. Her sole remedy...was to relay the information to the housekeeper...Such referral decisions hardly suggest a finding of supervisory status."

NLRB v. Monroe Co., ___ F. 2d ___, 94 LRRM 2020 (1976), holding in part: "Thus, when the Board exercises its special function of applying the general provisions of the Act to the complexities of industrial life ...and determines that an individual possesses supervisory status, the Board's determination stands if it has warranted in the record and a reasonable basis in the statute...

However, the Act expressly requires that the authority exercised by the employee in question be of a non-routine nature."

Reginald Alleyne, Chairman

